NO. 48580-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RODERICK KING-PICKETT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Suzan L. Clark, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Flagrant and ill intentioned prosecutorial misconduct during closing argument deprived Roderick Luther King-Pickett of a fair trial.

2. King-Pickett received ineffective assistance of counsel.

3. Washington's pattern instruction on reasonable doubt, WPIC 4.01,[1] is constitutionally infirm.

4. The trial court erred in imposing a $200 criminal filing fee pursuant to RCW 36.18.020(2)(h) without considering King-Pickett's ability to pay this legal financial obligation (LFO).

Issues Pertaining to Assignments of Error

1. The trial court explicitly excluded the State's evidence that a witness had been coerced or influenced to change his identification of King-Pickett as the intruder in the witness's home. In closing, however, the State argued the witness changed his identification of King-Pickett because he might have been pressured or influenced by outside sources, thereby referring to evidence expressly excluded by the trial court. Does the prosecutor's deliberate disregard of the trial court's ruling constitute flagrant and ill intentioned misconduct incapable of cure such that reversal is required?

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[1] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

2. Did defense counsel render ineffective assistance of counsel for failing to object to the prosecutorial misconduct identified in the preceding issue statement?

3. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists" misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to King-Pickett to provide a reason for why reasonable doubt exists?

4. Is the $200 criminal filing fee a discretionary LFO that requires consideration of financial circumstances and ability to pay before imposition?

B. STATEMENT OF THE CASE

The State charged King-Pickett with first degree burglary and first degree robbery arising from a September 4, 2015 home invasion in Vancouver. CP 3-4. The State included deadly weapon allegations for each charge. CP 3-4. The trial court permitted the State to amend its information at the beginning of trial to comport with this court's decision in State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015). CP 30-31; RP 29-30.

On the evening of September 4, 2015, Michael Freeman-Lema and MacKenzee Opp, a cohabiting couple, returned home to an unlocked door and a house in disarray. RP 64-65. Freeman-Lema, who entered the house, saw an intruder wearing a hoodie with a knife and hammer on the balcony.

RP 67-68. Freeman-Lema attempted to lock the sliding glass door, but the intruder was able to gain entry. RP 68-70. Freeman-Lema ran to get his rifle and screamed at the intruder to leave. RP 69-70. Freeman-Lema then shot the rifle and believed the bullet hit the intruder in the shoulder, given that the intruder "screamed out, ough, you shot me." RP 70. Opp, who was outside in the parking area, also testified she heard the intruder repeatedly yell "you shot me." RP 118.

The intruder grabbed a plastic white bag and left, keeping hold of the knife and hammer. RP 71-72. Freeman-Lema and Opp described the intruder wearing a gray hoodie. RP 105, 118. In Opp's 911 call, admitted at trial, Opp described the intruder as "black, a really dark skinned male. He has a gray sweatshirt on with a hoodie over it, jeans, white tennis shoes, and he has a white garbage bag in his hand." RP 137.

A while latter, a nearby officer stopped King-Pickett on foot given that he matched the race and sex description the officer received from dispatch and had white shopping bag with a hoodie on top. RP 170-73. A K-9 unit had also been deployed to track the intruder; the unit came across the officer who had detained King-Pickett and the dog alerted to "some bags that were there." RP 260.

Another officer, Richard Lagerquist, transported both Freeman-Lema and Opp to King-Pickett's vicinity for a show-up. RP 161-62. Lagerquist

stated Freeman-Lema identified King-Pickett with 70 percent certainty. RP 163. Lagerquist's testimony contradicted that of Freeman-Lema, who was adamant that he told Lagerquist he was 70 percent *unsure* King-Pickett was the intruder. RP 80-81, 88, 102-03. Freeman-Lema was also 70 unsure the white bag near King-Pickett during the show-up was the same bag the intruder took. RP 81, 103.

Freeman-Lema also testified he phoned the police a few days after the incident to correct their misunderstanding that he had positively identified the suspect, stating he never identified him. RP 86-87.

To try to explain the discrepancy between Freeman-Lema's and Lagerquist's testimonies, the State questioned Officer Ben Taylor, whom Freeman-Lema had called. Taylor began to testify Freeman-Lema called a few days after the incident to tell Taylor he had been confronted by one of King-Pickett's acquaintances. RP 226. Defense counsel objected and the State put on an offer of proof. RP 226-28. Taylor would testify that Freeman-Lema was approached by King-Pickett's acquaintances who "didn't find it kindly that [Freeman-Lema] was testifying against somebody that they knew." RP 227. The State wished to offer this testimony to show Freeman-Lema changed his identification after the threat "potentially because he was in fear." RP 228.

The trial court disallowed the Taylor's proffered testimony because there was no support, based on Freeman-Lema's testimony, that he had ever changed his identification. RP 228. The trial court found "there's no showing that any of this was done at the direction of the defendant," and thus indicated it would be unduly prejudicial to admit Taylor's testimony. RP 229. The prosecutor stated he understood the court's ruling. RP 229.

Nonetheless, the prosecutor argued in closing that Freeman-Lema changed his story because he might have been coerced to do so by "outside influences" or because "something happened to Mr. Freeman-Lema that caused him to lessen his identification or change his story somewhat." RP 320. Despite the trial court's clear ruling excluding any such evidence, defense counsel did not object to the prosecutor's line of argument.

The jury returned guilty verdicts on both first degree burglary and first degree robbery and determined King-Pickett was armed with a deadly weapon during the commission of both crimes. CP 122-25; RP 345-48.

The trial court sentenced King-Pickett to 160 months of confinement. This consisted of concurrent standard range terms of 112 months and 102 for the first degree robbery and first degree burglary, respectively, and two consecutive 24-month deadly weapon enhancements. CP 131; RP 355-56. The trial court waived all discretionary LFOs except for the $200 criminal filing fee. CP 132-33. Defense counsel pointed out that King-Pickett had

been unemployed since he was last released from prison; nonetheless, the trial court determined without explanation that he was "anticipated to eventually be able to pay the costs." RP 357.

This timely appeal follows. CP 142-43.

C. ARGUMENT

1. FLAGRANT AND ILL INTENTIONED PROSECUTORIAL MISCONDUCT DEPRIVED KING-PICKETT OF A FAIR TRIAL

Prosecutors are officers of the court and have a duty to ensure that the defendant receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When prosecutorial misconduct affects the jury's verdict, the misconduct violates the accused's rights to a fair trial and to an impartial jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

"A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). When a prosecutor violates a judicial ruling excluding evidence, it constitutes flagrant and prejudicial misconduct. State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993).

In Smith, the trial court granted the defense motion in limine prohibiting the prosecutor from examining Smith about his dishonorable

discharge from military service because of its prejudicial impact. 189 Wash. at 428. The prosecutor proceeded to cross-examine Smith about his discharge anyway and defense counsel failed to object. Id. at 428-29. The court held the prosecutor's actions were "highly prejudicial" and, "in view of the deliberate disregard by counsel of the court's ruling, prejudice must be presumed." Id. at 428-29. Thus, the court reversed and remanded for a new trial.

In Stith, likewise, the prosecutor argued in closing that Stith "was just coming back and he was dealing again," suggesting that Stith had prior drug convictions even though the trial court had specifically excluded such evidence. 71 Wn. App. at 21-22. Defense counsel objected and the trial court gave curative instructions. Id. at 22. The Court of Appeals nevertheless reversed, concluding the misconduct was "so prejudicial" that "[o]nce made, such remarks cannot be cured," and remanded for a new trial. Id. at 22-23.

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009), is also instructive. The trial court permitted the State to elicit evidence of physical abuse only if the defense opened the door by placing the alleged victim's delayed reporting at issue. Id. at 747. The prosecutor disregarded this directive, mentioning physical abuse in opening statement and introducing evidence of it during the State's case-in-chief. Id. The Washington Supreme

Court held the prosecuting attorney "contravened the trial court's ruling by impermissibly using the physical evidence" for propensity in violation of ER 404. Id. at 748-49. The court took care to note that "given the nature of the misconduct and the fact that the prosecuting attorney was well aware of the trial court's ruling and Fisher's standing objection, we do not believe that any limiting instruction could have neutralized the prejudicial effect." Id. at 748 n.4. The court therefore reversed and remanded for a new trial.

These cases require reversal here based on the prosecutor's almost identical flagrant and ill intentioned misconduct. The trial court excluded the State's evidence that Michael Freeman-Lema had been coerced or influenced to change his identification of King-Pickett as the intruder. In closing, however, the State argued Freeman-Lema would not identify King-Pickett as the intruder precisely because he might have been pressured or influenced by outside sources. The prosecutor's arguments thus referred to evidence the trial court specifically excluded. Under Smith, Stith, and Fisher, the prosecutor's arguments constituted flagrant and ill intentioned misconduct that requires reversal.

Michael Freeman-Lema's testimony was clear. He stated he never identified King-Pickett as the intruder in his home, and repeatedly testified he told police he was "70 percent unsure" King-Pickett was the intruder at a show-up shortly after the break in. RP 80-81, 88, 102-03. Freeman-Lema

was also 70 percent unsure the white bag near King-Pickett during the show-up was the same bag the intruder took from Freeman-Lema's apartment. RP 81, 103. In essence, his testimony about the bag was that white bags are indistinguishable from one another. RP 80-81, 101-02. Thus, Freeman-Lema unequivocally told the jury that he could not identify King-Pickett as the intruder and had always been 70 percent unsure King-Pickett was the intruder.

Freeman-Lema also testified he phoned investigating officers a few days after the incident to correct the police report. He explained "there was something wrong because I heard through certain people I had accusations saying that I knew who [the intruder] was, and I said that it was the individual, but I never did." RP 86. Freeman-Lema repeatedly stated that the police report that he had identified King-Pickett as the suspect was incorrect: "I didn't know who was in my house." RP 86-87. Thus, not only did Freeman-Lema tell jurors he had always been unsure King-Pickett was the intruder, he also told them he had consistently told police about this uncertainty and felt the need to correct law enforcement's misunderstanding.

Freeman-Lema's testimony differed from Officer Richard Lagerquist's testimony as regarded Freeman-Lema's identification. Lagerquist stated he asked Freeman-Lema how sure he was of his identification, to which Freeman-Lema responded, "5 or 8 percent." RP 163.

Lagerquist then testified, "I asked him if he meant if that was out of 100 percent? He said, no. If it's at 100 percent, that he's 70 percent sure that it was the person -- the person stopped was the person that was involved in the incident." RP 163 (emphasis added). Thus, Lagerquist stated Freeman-Lema was 70 percent sure of his identification while Freeman-Lema stated repeatedly that he told officers he was 70 percent unsure.

In an attempt to explain this discrepancy, the State tried to elicit certain testimony from Officer Ben Taylor, whom Freeman-Lema phoned to clarify he had made no identification of King-Pickett. Taylor began to testify Freeman-Lema called him "a few days later to tell [him] that he was confronted by one of his acquaintances," which drew a defense objection. RP 226. Outside the jury's presence, the State put on an offer of proof that Freeman-Lema "wanted to tell [Taylor] this because he had some acquaintances that were affiliated with some organizations that didn't find it kindly that he was testifying against somebody that they knew." RP 227. Thus, according to the prosecutor, "the State should be able to explain -- we think it's relevant to show why Mr. Freeman-Lema would provide a different story later similar to a domestic violence case where somebody might be in fear of being harmed and then would maybe want to change their story." RP 227-28. The State also pointed out that Freeman-Lema testified

he did not want to testify in the case, prompting the prosecutor to "think it's potentially because he was in fear." RP 228.

The trial court pointed out that Freeman-Lema's testimony was clearly that "he wanted to correct that someone had the wrong impression," so there was no support for the State's theory that Freeman-Lema was threatened into changing his story. RP 228. However, the prosecutor represented that "Officer Taylor distinctly remembers having a conversation with Mr. Freeman-Lema . . . where he attempted to change his identification and said it was because people had been influencing him -- or threatening him since he made this police report." RP 229. Though defense counsel pointed out that this never came out through discovery, the trial court excluded Taylor's testimony because the probative value did not outweigh the prejudicial effect, noting, "there's no showing that any of this was done at the direction of the defendant." RP 229. The prosecutor indicated he understood the court's ruling. RP 229. Thus, the trial court sustained the defense objection to the State's questioning about Freeman-Lema's supposed statement to Officer Taylor. RP 229-30.

Despite the trial court's ruling, the State argued in closing that Freeman-Lema changed his story because he might have been tampered with:

> And here on the stand you heard from Mr. Freeman-Lema that he doesn't want to be here. He doesn't want to be part of this. It seems like he's moved on with his life. For whatever reason, he didn't want to testify. Well, that doesn't mean the defendant's not guilty.
>
> And he said on the stand I'm pretty sure I said to the police I'm 70 percent unsure that that's the person. He also said three or four days later he called law enforcement to attempt to correct the police report.
>
> There could have been outside influences. There could have been something that happened to Mr. Freeman-Lema that caused him to lessen his identification or change his story somewhat. Either way that 911 tape the day in question right after this happened when it was fresh in their mind, they gave a pretty clear description that matched this person we have in court.

RP 320.

The State's suggestion that Freeman-Lema changed his identification because of "outside influences" or because "something that happened to" him constituted flagrant and ill intentioned misconduct. The trial court explicitly excluded any and all evidence regarding these supposed outside influences on Freeman-Lema. The prosecutor deliberately disregarded the trial court's ruling and instead implied that Freeman-Lema altered his identification of King-Pickett because he had been influenced, coerced, or threatened to do so. In essence, the prosecutor told the jury they should not believe Freeman-Lema's clear statement that he never could and never did identify King-Pickett as the intruder because King-Pickett or his associates had tampered with him. This was flagrant and ill intentioned misconduct

under Smith, Stith, and Fisher. And, "in view of the deliberate disregard by counsel of the court's ruling, prejudice must be presumed." Smith, 189 Wash. at 428-29.

In any event, the prejudice is obvious. This case came down to identity. Neither of the eyewitnesses put on by the State could identify King-Pickett as the intruder, either from the events that transpired at their home or at the show-up that followed. RP 77, 80-81, 86-89, 101-02, 105, 133. Mackenzie Opp's 911 call identified the intruder as a "black" "really dark skinned male" with a gray hoodie, jeans, and white tennis shoes. RP 137. Freeman-Lema stated all he recalled about the intruder's description was "that sweater, the hoodie over the face and the knife and the hammer." RP 105.

In addition, King-Pickett had not sustained any gunshot wound even though Freeman-Lema thought he had shot the intruder, who "screamed out, ough, you shot me." RP 70-71, 96. Opp also recalled hearing the intruder "screaming you shot me, you shot me" as he exited the apartment. RP 118. Freeman-Lema's and Opp's testimony about the intruder having been shot thus supported the defense theory that King-Pickett was not the intruder, given that King-Pickett sustained no gunshot wound.

The officer who stopped King-Pickett could not definitively identify him from the description from dispatch, and stated he stopped King-Pickett

simply because he happened to be a black male carrying a plastic bag. RP 172. And, although a deployed K-9 unit tracked to the area King-Pickett had been stopped by the other officer, the dog alerted on plastic bags nearby, not on King-Pickett himself. RP 260. Thus, the K-9 unit did not establish that King-Pickett was the intruder, but at most that he possessed items taken at the time of the intrusion. As defense counsel argued during closing, King-Pickett might have been appropriately identified as a possessor of stolen property from the Freeman-Lema/Opp household, but nothing identified him as the actual intruder in that household. See RP 326-27.

Because the State lacked any definitive evidence that identified King-Pickett as the intruder, the prosecutor decided to create some in the minds of jurors by suggesting Freeman-Lema had been influenced to alter his identification. The prosecutor's statements that there could have been something that happened to Freeman-Lema that caused him to lessen his identification implied that King-Pickett or those aligned with King-Pickett had threatened or strong-armed Freeman-Lema into changing his story. Thus, the prosecutor impugned King-Pickett by suggesting he had successfully tampered with the State's lead witness. This was such an inflammatory suggestion that a curative instruction could not have mitigated its prejudicial effect. Given that there was nothing in evidence to support the prosecution's argument and given that the trial court had explicitly excluded

any such evidence, the prosecutor's misconduct was so flagrant that no instruction could have cured it. This court must reverse.

2. KING-PICKETT'S LAWYER PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO THE PROSECUTOR'S EGREGIOUS MISCONDUCT

Alternatively, defense counsel rendered ineffective assistance of counsel when she failed to object to the prosecutor's flagrant and ill intentioned argument.

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome [of trial] would have differed." Id.

Defense counsel's performance was objectively deficient here. When a prosecutor resorts to improper argument, the defense has a duty to interpose a contemporaneous objection "'to give the court an opportunity to

correct counsel, and to caution the jurors against being influenced by such remarks.'" State v. Emery, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) (quoting 13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d ed. 2004)). Here, defense counsel failed to object even though she was required to do so to preserve the prosecutorial misconduct for review. Counsel's failure to object to serious misconduct constitutes ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

No strategy or tactic could explain counsel's failure to object. Indeed, defense counsel successfully litigated the exclusion of the prosecution's proffered evidence that Freeman-Lema lessened his identification of King-Pickett because he was threatened or coerced to do so. RP 226-29. Given that counsel fought to keep this evidence out, no valid tactic could explain failing to object to the prosecution's suggestion during closing that Freeman-Lema had changed his story because someone might have tampered with him. Under the circumstances, counsel's failure to object was objectively deficient performance.

Counsel's deficient performance prejudiced King-Pickett. As discussed, there was no evidence that King-Pickett or his associate had influenced Freeman-Lema in any way. The State lacked definitive evidence that King-Pickett was the actual intruder rather than a mere possessor of

stolen property. By failing to object, defense counsel permitted the prosecution's representation that Freeman-Lema altered his story as a result of witness tampering to go unchallenged. This permitted the State to fill a gaping hole in the presentation of its case. Within a reasonable probability, counsel's deficient performance in failing to object to the prosecutor's flagrant and ill intentioned misconduct changed the outcome of trial. Because King-Pickett received ineffective assistance of counsel, this court should reverse.

3. WASHINGTON'S PATTERN JURY INSTRUCTION THAT TELLS JURORS "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

King-Pickett's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 99; RP 297. This instruction, based on WPIC 4.01, is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Not only must jurors have a reasonable doubt, they must also have an articulable doubt. This makes it

more difficult for jurors to acquit and easier for the prosecution to obtain convictions.

Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same exact thing.

WPIC 4.01 violates dues process and the jury-trial guarantee. U.S. CONST. amends. VI, XIV; CONST. art. I, §§ 3, 22. Instructing jurors with WPIC 4.01 is structural error and requires reversal.

a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence

Jury instructions must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar. See,

e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction allowed jury to find actual imminent harm was necessary for self defense, resulting in court's determination that jury could have applied erroneous self defense standard), overruled in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying on grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785 (discussing different between use of "should" and use of word indicating "must" regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

The error in WPIC 4.01 is obvious to any English speaker. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of "presume" to determine how jury may have

interpreted instruction); Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition of "common" to ascertain the jury's likely understanding of the word in instruction).

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . ." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'") (quoting United States v. Johnson, 343 F.2d 5, 6, n.1 (2d Cir. 1965)).

Thus, an instruction defining reasonable doubt as "a doubt based on reason" would be proper. WPIC 4.01 does not do that, however. WPIC 4.01 requires "a reason" for the doubt, which is different than a doubt based on reason.

The placement of the indefinite article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01, means "an expression or statement offered as an explanation of a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington's pattern instruction on reasonable doubt is unconstitutional because its language requires more than just a reasonable doubt to acquit. It instead explicitly requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or

pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option.

Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these

various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, shifting the burden and undermining the presumption of innocence.

The beyond-a-reasonable-doubt standard enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Winship, 397 U.S. at 363. The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Bennett, 161 Wn.2d at 316. The "doubt for which a reason exists" language in WPIC 4.01 does just that by directing jurors they must have a reason to acquit rather than a doubt based on reason.

In prosecutorial misconduct cases, appellate courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. Such fill-in-the-blank arguments "improper impl[y] that the jury must be able to articulate its reasonable doubt" and "subtly shift[] the burden to the defense." Emery, 174 Wn.2d at 760; accord State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158

Wn. App. 677, 682, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Emery, 174 Wn.2d at 759. Simply put, "a jury need do nothing to find a defendant not guilty." Id.

These improper burden shifting arguments are not the mere product of prosecutorial malfeasance, however. The offensive arguments did not originate in a vacuum but sprang directly from WPIC 4.01's language. In Anderson, for instance, the prosecutor recited WPIC 4.01 before arguing, "in order to find the defendant not guilty, you have to say, 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. at 424. In Johnson, likewise, the prosecutor told jurors "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. at 682.

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The misconduct cases make clear that WPIC 4.01

is the true culprit. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same hazard?

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). An ambiguous instruction that permits erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity—which King-Pickett does not concede—that is not the correct standard for measuring the adequacy of jury instructions. Courts have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01's infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist unless and until a reason for it can

be articulated. Instructions must not be "misleading to the ordinary mind." Dana, 73 Wn.2d at 537. WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction and the fact that legal professionals have been misled by the instruction compels this conclusion.

Recently, in State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015), the Washington Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt."[2] 183 Wn.2d at 585. The point the Kalebaugh

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[2] This conclusion is sound:

> Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction "a reasonable doubt is such a doubt as the jury are able to give reason for" because it "puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case").

court missed, however, is that if it is error to instruct jurors reasonable doubt requires a reason to be given, it is just as much error to tell jurors reasonable doubt requires a reason to exist.

b. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01

In Bennett, the Washington Supreme Court directed trial courts to give WPIC 4.01, at least "until a better instruction is approved." 161 Wn.2d at 318. In Emery, the court contrasted the "proper description" of reasonable doubt as a "doubt for which a reason exists" with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. Emery, 174 Wn.2d at 759. In Kalebaugh, the court similarly contrasted "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists" with an improper instruction that "a reasonable doubt is 'a doubt for which a reason can be given.'" 183 Wn.2d at 585. The Kalebaugh court concluded the trial court's erroneous instruction—"a doubt for which a reason can be given"—was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here." Id.

The court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily

interpreted to require the articulation of a reasonable doubt. Jurors are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their doubt. The plain language of WPIC 4.01 requires this articulation. No Washington court has ever explained how this is not so.

Kalebaugh provided no answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case. In fact, none of the appellants in Kalebaugh, Emery, or Bennett argued the doubt "for which a reason exists" language in WPIC 4.01 misstates the reasonable doubt standard. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord In re Electric Lightwave, Inc. 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue."). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control.

c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given

Forty years ago, Division Two addressed an argument that "'[t]he doubt which entitled the defendant to an acquittal must be a doubt for which

a reason exists' (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instruction). Thompson brushed aside the articulation argument in one sentence, stating "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Thompson, 13 Wn. App. at 5.

Thompson's cursory analysis is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference in meaning between a doubt based on "reason" and a doubt based on "a reason." Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing "this instruction has its detractors" but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959), and

State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5.

In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated that the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without merit. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959). Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addressed the "doubt for which a reason exists" language in the instruction, so it was not at issue.

The Thompson court observed "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following language: "It should be a doubt for which a good reason exists,—a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering." Harras, 25 Wash. at 421. Harras simply maintained the "great weight of authority" supported it, citing the note to Burt v. State, 48 Am. St. Rep. 574, 16 So. 342 (Miss. 1894).[3] However, this

[3] The relevant portion of the note cited by Harras is attached as Appendix A.

note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[4]

So our supreme court in Harras viewed its "a doubt for which a good reason exists" instruction as equivalent to those instructions requiring a reason to be given for the doubt. And then Thompson upheld the doubt "for which a reason exists" instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01's doubt "for which a reason exists" language means a doubt for which a reason can be given. This is a serious problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 759-60. The Kalebaugh court explicitly held, moreover, that it was a manifest constitutional error to instruct the jury that reasonable doubt is "a doubt for which a reason can be given." Kalebaugh, 183 Wn.2d at 584-85.

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[4] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for."); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt,-such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 255-59, 36 P. 573 (1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), sheds further light on this dilemma. Harsted took exception to the instruction, "The expression, 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Id. at 162. The court explained the meaning of reasonable doubt:

> [I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given.

Id. at 162-63. In support of its holding that there was nothing wrong with the challenged language, the Harsted court cited a number of out-of-state cases upholding instructions defining a reasonable doubt as a doubt for which a reason can be given. Id. at 164. Among them was Butler v. State, 78 N.W. 590, 591-92 (Wis. 1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." While the Harsted court noted some courts had disapproved of similar language, it was "impressed" with the view adopted by the other cases it cited and felt "constrained" to uphold the instruction. 66 Wash. at 165.

We now arrive at the genesis of the problem. More than 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a

doubt for which a reason exists means a doubt for which a reason can be given. This revelation annihilates any argument that there is a real difference between a doubt "for which a reason exists" in WPIC 4.01 and being able to give a reason for why doubt exists. Our supreme court found no such distinction in Harsted and Harras.

More recent case law also confirms that there is no meaningful distinction between the acceptable a doubt "for which a reason exists" and the erroneous a doubt "for which a reason can be given." In State v. Weiss, 73 Wn.2d 372, 378-79, 438 P.2d 610 (1968), the Washington Supreme Court determined the instruction, "A reasonable doubt is a doubt for which a sensible reason can be given," was "a correct statement of the law." Although the court disapproved of the instruction overall because it was too abbreviated, the court nonetheless concluded that "the trial court did not err in submitting the instruction given." Id. at 379. Weiss, like Harras and Harsted, shows that there is no substantive difference between an instruction requiring reasonable doubt to merely exist versus an instruction requiring reasonable doubt to be given.

This problem has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Harras, Harsted, and Weiss

explicitly contradict Emery's and Kalebaugh's condemnation. The law has evolved, and what was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains stuck in the past, outpaced by the Washington courts' modern understanding of the reasonable doubt standard and swift eschewal of any articulation requirement.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable different between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require a reason for why reasonable doubt exists. This repugnant requirement distorts the reasonable doubt standard and shifts the burden of proof to the detriment of the accused.

d. This structural error requires reversal

Defense counsel did not object to the instruction at issue here. See RP 293 (defense counsel "approv[ing] the insructions"). However, the instructional error may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as manifest constitutional errors for RAP 2.5(a)(3) purposes. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d

182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

The State might attempt to argue the invited error doctrine precludes King-Pickett's claim because defense counsel submitted a full set of jury instructions that included WPIC 4.01. CP 55. However, counsel did so, at least in part, because the trial court ordered the submission of instructions: "Well, the rule requires instructions by both parties be filed the first day of trial." RP 243 (emphasis added). The trial court was mistaken.

Division One recently determined CrR 6.15(a), the criminal rule on jury instructions, "does not impose an obligation to propose jury instructions. If a party wishes to propose instructions, CrR 6.15(a) sets forth the timing and procedure to be followed." State v. Hood, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 5375194, at *3 (Sept. 26, 2016). The court explained,

> Since it is the State that wishes to secure the conviction, the State ordinarily assumes the burden of proposing an appropriate and comprehensive set of instructions. Just as a defendant has no duty to bring himself to trial, a defendant has no duty to propose the instructions that will enable the State to convict him.

Id. (citation omitted). Thus, the trial court was incorrect when it directed defense counsel to submit jury instructions given that King-Pickett had no obligation to do so. In these circumstances, the invited error doctrine should not apply.

But even if defense counsel did invite error by proposing that WPIC 4.01 be given, defense counsel rendered ineffective assistance of counsel under Strickland, 466 U.S. at 687. No reasonable strategy could explain submitting a jury instruction duplicative of an instruction the State has already proposed. See CP 169 (State's proposed reasonable doubt instruction). The sole consequence of duplicating instructions proposed by an adverse party is making future challenges to jury instructions more arduous for appellate counsel. There is no conceivable benefit to a criminal defendant to join in jury instructions proposed by the prosecution. No objectively reasonable defense attorney would willingly burden her client's future claims against the jury instructions by duplicating instructions already proposed by the State. If defense counsel invited error by proposing a duplicate reasonable doubt instruction, counsel's performance fell below an objective standard of reasonableness.

If the State argues King-Pickett invited the error, the prejudice prong of the Strickland analysis is self-fulfilling. The State would be arguing that this court may not consider King-Pickett's good faith constitutional

challenge to a reasonable doubt instruction that requires jurors to articulate the reason for their doubt. Had defense counsel not proposed a duplicative instruction, the State could not claim King-Pickett invited any error. Nor could the State ask this court to decline to reach the merits of King-Pickett's arguments. If this court were to apply the invited error doctrine and decline to reach the merits of this constitutional issued based on trial court's deficient performance, there is a reasonable probability that the outcome of this appeal—an thus this prosecution—would differ.

If defense counsel precluded review of this issue under the invited error doctrine, her performance was objectively deficient. If the court declines review under the invited error doctrine, the resulting prejudice is King-Pickett's inability to raise a constitutional issue on appeal. This court should reject any invited error argument and reach the merits of King-Pickett's challenge to WPIC 4.01.

WPIC 4.01's language requires more than just a reasonable doubt to acquit; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. The trial court's use of WPIC 4.01 was structural error and requires reversal of King-Pickett's conviction and a new trial.

4. THE $200 CRIMINAL FILING FEE IS NOT MANDATORY AND THE TRIAL COURT SHOULD HAVE INQUIRED INTO GREGER'S ABILITY TO PAY BEFORE IMPOSING IT

The trial court imposed a $200 criminal filing fee. CP 132. Because this fee is discretionary, not mandatory, the trial court erred in imposing it without first conducting an adequate inquiry into King-Pickett's financial conditions and ability to pay.

RCW 9.94A.760 permits trial courts to order LFOs as part of a criminal sentence. However, RCW 10.01.160(3) prohibits imposing LFOs unless "the defendant is or will be able to pay them." To determine whether to impose LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The Washington Supreme Court held RCW 10.01.160(3) requires trail courts to first consider an individual's current and future ability to pay before imposing discretionary LFOs. State v. Blazina, 182 Wn.2d 827, 837-39, 344 P.3d 680 (2015). The record must reflect this inquiry, which should include at minimum the length of incarceration and other debts. Id. at 838.

Division Two has indicated that the $200 criminal filing fee is mandatory, not discretionary. State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). King-Pickett disagrees. The Lundy court provided no

rationale or analysis of the statutory language supporting its conclusion that the fee is mandatory. See id.; see also State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (this court's mere citation to Lundy for proposition that filing fee must be imposed regardless of indigency without statutory analysis). Lundy was wrongly decided and the pernicious effects of LFOs recognized in Blazina demonstrate the harmfulness of imposing discretionary LFOs without an adequate ability-to-pay inquiry. This court should therefore overrule Lundy's determination that the filing fee is a mandatory LFO. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned").

The language of RCW 36.18.020(2)(h), which provides authority to impose a filing fee, differs from other statutes authorizing mandatory fees. For instance, the victim penalty assessment statute provides, "When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). This statute is unambiguous in its mandate that the assessment "shall be imposed." The same is true of the DNA collection fee statute, which provides, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added).

RCW 36.18.020(2)(h) is not the same. It provides that, upon conviction, "an adult defendant in a criminal case shall be liable for a fee of two hundred dollars." (Emphasis added.) In contrast to the DNA collection and victim penalty assessment statutes—both of which demonstrate that the legislature knows how to unambiguously mandate the imposition of a legal financial obligation—RCW 36.18.020(2)(h) does not mandate the imposition or inclusion of a $200 criminal filing fee.

Nowhere in RCW 36.18.020(2)(h)'s language is the requirement that trial courts must impose the $200 filing fee upon conviction. Although RCW 36.18.020(2) states that "[c]lerks of superior courts shall collect" the fee, no language indicates the fee cannot be waived by a judge. Many superior courts never impose the $200 filing fee. The $200 filing fee is a discretionary LFO, not a mandatory one.

Moreover, being liable for a fee and being required to pay a fee are different things. "Liability" for a fee does not make the fee mandatory given that the term "liable" encompasses a broad range of possibilities, from making a person "obligated" in law to pay to imposing a "future possible or probable happening that may not occur." BLACK'S LAW DICTIONARY 915 (6th ed. 1990). Thus, "liable" can mean a situation that *might* give rise to legal liability. At best, the statutory language is ambiguous as to whether it is mandatory. Under the rule of lenity, the statutory language must be

interpreted in King-Pickett's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

This court should not adhere to Lundy, which contained no reasoning to support its conclusion that the criminal filing fee is mandatory. The Washington Supreme Court recently appeared skeptical that the $200 filing fee was mandatory, noting it has only "been treated as mandatory by the Court of Appeals." State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016). That the court would identify those fees designated as mandatory by the legislature on the one hand, and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other, shows the supreme court sees a distinction. See id. This court should not follow Lundy, provide meaningful consideration of RCW 36.18.020(2)(h)'s language, and hold that the criminal filing fee is a discretionary LFO.

In response, the State might argue that this court should decline to consider this argument because King-Pickett did not specifically object to it at sentencing. However, RAP 2.5(a) provides that this court "may refuse to review any claim of error which was not raised in the trial court"—so this court has ample discretion. And RAP 1.2 expresses a clear preference to liberally interpret the rules of appellate procedure "to promote justice and facilitate the decision of cases on the merits." In light of Blazina's call to address a "broken LFO systems," 182 Wn.2d at 835, and the Washington

Supreme Court's recent skepticism in Duncan that the filing fee is mandatory, this court should address King-Pickett's claim and decide it on the merits.

Greger asks this court to hold the criminal filing fee is a discretionary LFO and remand for resentencing so that the $200 fee may be stricken from the judgment and sentence.

5. APPELLATE COSTS SHOULD BE DENIED

a. King-Pickett is presumed indigent throughout review

Appellate courts indisputably have discretion to deny appellate costs. RCW 10.73.160(1); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016). This court should exercise this discretion and deny any request by the State for thousands of dollars in appellate costs.

The trial court determined King-Pickett was indigent and entitled to appellate representation and the creation of the appellate record at public expense, and so advised King-Pickett. CP 126, 149-50. Based on this determination, King-Pickett is presumed indigent throughout this review. RAP 15.2(f). The Sinclair court stated, "We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve . . . . We therefore presume Sinclair remains indigent." 192 Wn. App. at 393. Because the trial court here likewise found King-Pickett

indigent, this court should presume he remains so and deny any request by the State for appellate costs.

Furthermore, any reasonable person reading the trial court's indigency order would believe (1) King-Pickett was entitled to an attorney to represent him and to the preparation of an appellate record "wholly at public expense" and (2) "wholly at public expense" meant King-Pickett would pay nothing due to his indigency, win or lose. The imposition of appellate costs would convert the trial court's indigency order into a complete falsehood. This alone is a sound reason for this court to exercise discretion and deny appellate costs.

b. Attempting to fund the Office of Public Defense on the backs of indigent persons when their public defenders lose their appeals undermines the attorney-client relationship and creates a perverse conflict of interest

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not prevail, they will be assessed, at minimum, thousands of dollars in appellate costs. Unlike other lawyers whose clients pay them, the client's ability to pay does not factor into an appellate defender's representation of his or her client. Yet appellate defenders must still play the role of financial planner, hedging the strength of their arguments against the vast sums of money their clients will owe and attempting to advise their clients accordingly. This undermines the appellate

defender's important role in advancing all issues of arguable merit on clients' behalf and thereby undermines the relationship between attorney and client.

This relationship is further undermined when clients see that the Office of Public Defense is the primary beneficiary—to the tune of thousands of dollars—of their unsuccessful arguments. This creates a perverse incentive: the Office of Public Defense, which pays the salaries of all appellate defenders and through which all appellate defenders represent their clients, collects money only when the appellate defender is unsuccessful. This is readily apparent as a conflict of interest and undermines any appearance that the appellate cost scheme is fair. See RPC 1.7(a)(2) (a conflict exists where "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer"); Wood v. Georgia, 450 U.S. 261, 268-70, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (acknowledging conflict when interest of third party paying lawyer is at odds with client's interest); Winkler v. Keane, 7 F.3d 304, 308 (2d Cir. 1993) (contingent fee in criminal case created actual conflict of interest); United States v. Horton, 845 F.2d 1414, 1419 (7th Cir. 1988) (conflict of interest arises when defense attorney must "make a choice advancing his own interest to the detriment of his client's interests").

The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the organization that funds their attorneys when they lose. Franz Kafka himself would strain to imagine such a design. This court should deny appellate costs.

c. The record establishes that this court should waive discretionary appellate costs

The Sinclair court indicated that both parties "can be helpful to the appellate court's exercise of its discretion by developing fact-specific arguments from information that is available in the existing record." 192 Wn. App. at 392. The existing record here shows a man who has no real property, no personal property, no income, no checking account, no savings account, and no gainful employment. Appendix B[5] at 2. King-Pickett also reported he was homeless. Appendix B at 2. King-Pickett also has a lengthy criminal history and undoubtedly has significant outstanding LFOs from his prior convictions. See CP 140-41. Based on information available in the record, there is no reason to believe King-Pickett is or ever will be able to pay thousands of dollars plus accumulating interest in appellate costs. This court should accordingly exercise discretion and deny any request by the State for appellate costs.

[5] King-Pickett has filed a supplemental designation of clerk's papers to include his indigent defense screening documentation. To facilitate this court's review, portions of this documentation are included in Appendix B.

D. CONCLUSION

Because his first trial was tainted by egregious prosecutorial misconduct, King-Pickett asks that this court reverse his convictions and remand for a new and fair trial.

DATED this 12th day of October, 2016.

Respectfully submitted,

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APPENDIX A

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

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N. Y. 503; *Cohen* v. *State*, 50 Ala. 103. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State* v. *Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann* v. *State*, 83 Ga. 44, 52. And in *State* v. *Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry* v. *State*, 133 Ind. 677; *State* v. *Sauer*, 38 Minn. 438; *Ray* v. *State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan* v. *State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr* v. *State*, 23 Neb. 749; *Cowan* v. *State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray* v. *State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon* v. *People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn* v. *People*, 109 Ill. 635; *Wacaser* v. *People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Bowden* v. *State*, 102 Ala. 78; *Welsh* v. *State*, 96 Ala. 93; *State* v. *Gibbs*, 10 Mont. 213; *Miller* v. *People*, 39 Ill. 457; *Willis* v. *State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Jarrell* v. *State*, 58 Ind. 293; *Arnold* v. *State*, 23 Ind. 170; *State* v. *Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

APPENDIX B

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IN THE STATE OF WASHINGTON
FOR CLARK COUNTY

DEFENDANT NAME: KING, RODERICK LUTHER

15-1-01708-0

DOB: 11/18/87

CLARK COUNTY CORRECTIONS
COURT INFORMATION AND FINANCIAL
SCREENING FOR APPOINTED COUNSEL

CASE/CHARGE#	
NEW CHARGE	BURGLARY-I
NEW CHARGE	ROBBERY I
FFJ	FUGITIVE FROM JUSTICE

ATTACHMENT: COURT INFORMATION AND APPOINTED COUNSEL SCREENING

CLARK COUNTY CORRECTIONS - RELEASE UNIT

NAME: KING, RODERICK LUTHER **CFN:** 182714 **DOB:** 11/18/87
Booked: 09/05/15 **COURT DATE:**09/08/15

Docket#	LEA	Charge Description
NEW CHARGE	VPD	BURGLARY-I
NEW CHARGE	VPD	ROBBERY I
FFJ	CKP	FUGITIVE FROM JUSTICE

Current charge felony 1 1

RESIDENCE: Verified - YES (NO) **FAMILY IN CLARK COUNTY:** (YES) NO
PHONE: 971-263-9178 **Msg:** YES (NO) 360-326-0637 cell **BOARD / OWN / RENT**
ADDRESS: 3108 GRAND BLVD / homeless **CITY:** VANCOUVER **STATE:** WA **ZIP:** 98661
FOR: 1 Mo (Yr) **LIVES WITH:** _____ **RELATIONSHIP:** _____
TIME IN: Clark / Mult / Other County Area **CURRENT:** 22 Mo (Yr) **PREVIOUS:** _____ Mo Yr
PREVIOUS ADDRESS: _____ Current address <1 yr 1 1

REFERENCES: Verified - YES (NO) **MARITAL STATUS:** (S) M DIV SEP WID RDP

Reference	*Address*	*Phone*	*Relationship*
Myra	3200 NE 6th Ave	unknown	mother

EMPLOYMENT: Verified - YES (NO) **LEGAL DEPENDENTS INCLUDING SELF?** 2
EMPLOYER: Unemployed **ADDRESS:** _____ **PHONE:** _____
PRIOR: _____ **PRESENT:** _____ **POSITION:** _____ **LENGTH EMPLOYED:** _____ Mo Yr
X **UNEMPLOYED** - How Long? unknown – months **PRIMARY CARE GIVER?** YES (NO)
0 **OTHER MEANS OF SUPPORT:** ___ Welfare ___ Disability ___ Other: ____ < 2 yrs continuous emp 1 1

CURRENT STATUS: Verified - Y(N) **HISTORY OF ESCAPE:** Y(N) **CURRENT WARRANT OTHER JURIS?** 1 0
X Probation _____ Parole _____ Diversion _____ Other **TYPE:** _____
NAME: _____ AGENCY: Clark **WHERE:** _____
PHONE: _____ CHARGE: robbery **WHEN:** _____
HOLD? Y/N **PENDING UN-ADJUDICATED CHARGES:** 0 1 0 **COURT DATE:** _____

CRIMINAL RECORD: Verified - Y(N) **PRIOR FTAs** Y(N) **2 OR MORE FTA:** Y(N) 2 0 **PRIOR RORs:** yes

	Charge	*Location*	*Year*	*Disposition*
1)				
2)				

2 or more Violent conv 1 0
1 or more Misd/Fel conv 1 1

Defendant's Signature: X _____ Date: 9/6/15
Interviewer's Signature: X _____ Date: 9/6/15

INTERVIEWER RECOMMENDS:
_____ Court Info Only
Risk Score 5 deny
(Release Risk Low=1 Med=3 High=5)
FINANCIAL: (Q) NQ NI DEF

OTHER:

0 Mental Health	0 Alcohol	0 Drugs 1	0
0 Methadone	0 Antabuse	0 Prior Treatment	
0 Gang Affiliations	0 Suicidal	0 Veteran	

COMMENTS: Defendant states he has been transient for 1 year. Unemployed for an unknown number of months. Has a lengthy criminal history to include FTAs, assault. Deny release. High risk.

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NIELSEN, BROMAN & KOCH, PLLC

October 12, 2016 - 3:26 PM

Transmittal Letter

Document Uploaded: 1-485800-Appellant's Brief.pdf

Case Name: State v. Roderick King-Pickett
Court of Appeals Case Number: 48580-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Copy sent to: Roderick L. King-Pickett DOC No. 328973 Washington State Penitentiary
1313 North 13th Avenue Walla Walla, WA 99362

Sender Name: Kevin March - Email: marchk@nwattorney.net

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